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Supreme Court, U.S.
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In The

SUPREME COURT OF THE UNITED STATES

OFFICE OF THE CLERK

October Term, 1997

****

ALLAN LEDFORD,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

****

On Petition For Writ Of Certiorari
To The United States Court Of Appeals For The Sixth Circuit

****

PETITION FOR WRIT OF CERTIORARI

****

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58 pp

QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE DISTRICT COURT'S REFUSAL TO CONDUCT AN EVIDENTIARY HEARING CONCERNING EVIDENCE THAT A JUROR WITHHELD PERTINENT INFORMATION FROM THE COURT DURING VOIR DIRE EFFECTIVELY DENIED THE PETITIONER HIS SIXTH AMENDMENT RIGHT TO AN IMPARTIAL JURY?

II. WHETHER THE GOVERNMENT VIOLATED BATSON V. KENTUCKY AND PURKETT V. ELEM BY USING TWO OF ITS SEVEN PEREMPTORY CHALLENGES TO EXCLUDE THE ONLY TWO BLACK PROSPECTIVE JURORS FOR NO REASON OTHER THAN NON-VERIFIABLE "BODY LANGUAGE"?

III. WHETHER THE DISTRICT COURT REVERSIBLY ERRED BY ALLOWING THE GOVERNMENT'S CROSS-EXAMINATION OF THE PETITIONER TO IMPROPERLY DELVE INTO THE DETAILS BEHIND THE PETITIONER'S PRIOR CONVICTIONS, ESPECIALLY WHEN COMBINED WITH THE DISTRICT COURT'S FAILURE TO GIVE AN IMMEDIATE, CAUTIONARY JURY INSTRUCTION?

IV. WHETHER THE APPLICATION OF 18 *U.S.C.* § 1956(a)(1)(B)(i) TO PUNISH CRIMINAL BEHAVIOR NOT INVOLVING DRUGS OR ORGANIZED CRIME CONTRAVENES THE CONGRESSIONAL INTENT BEHIND THE MONEY LAUNDERING STATUTE?

V. WHETHER 18 *U.S.C.* § 1956(a)(1)(B)(i) IS UNCONSTITUTIONALLY VAGUE BECAUSE IT NEGLECTS TO DEFINE WHAT IS MEANT BY THE WORD "PROCEEDS".

VI. WHETHER THE MONEY LAUNDERING SENTENCING GUIDELINE (*U.S.S.G* § 2S1.1) IS APPLICABLE TO OFFENSES THAT ARE NEITHER DRUG RELATED NOR ORGANIZED CRIME-RELATED, AND IF SO WHETHER THE SEVERITY OF THE GUIDELINE IN SUCH SITUATIONS NECESSITATES THE APPLICATION OF A DOWNWARD DEPARTURE?

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OPINIONS BELOW

United States District Court Judge R. Allan Edgar entered a judgment in the U.S. District Court for the Eastern District of Tennessee (R. 42) against the petitioner on May 14, 1996, but did not render a formal opinion. The decision of the United States Court of Appeals for the Sixth Circuit in U.S. v. Allan Ledford (consolidated case Nos. 96-5659 and 96-6589) is unpublished, but is attached in the appendix.

STATEMENT OF JURISDICTION

The judgment of the U.S. Court of Appeals for the Sixth Circuit was entered on October 22, 1997. The petitioner then timely filed a petition to rehear, which was denied by the Sixth Circuit on November 20, 1997. The jurisdiction of this honorable court is invoked pursuant to 28 *U.S.C.* § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the U.S. Constitution in relevant part states "No person shall be ... deprived of life, liberty, or property, without due process of law; ..."

The Sixth Amendment to the U.S. Constitution in relevant part provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury...".

Section 1 of the Fourteenth Amendment to the U.S. Constitution in relevant part says that:

> ... No state shall make or enforce any law which

shall abridge the privileges of immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Finally, 18 *U.S.C.* § 1956(a)(1)(B)(i) provides:

(a)(1) Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity - (B) knowing that the transaction is designed in whole or in part - (i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity;

STATEMENT OF THE CASE

On September 26, 1995, the petitioner, Allan Ledford, (referred to in this petition as the "petitioner") was originally indicted on eight counts of wire fraud, in violation of 18 *U.S.C.* § 1343, and six counts of money laundering, in violation of 18 *U.S.C.* § 1956(a)(1)(B)(i). (R. 1.) None of the counts levied against the petitioner contained any allegations that the petitioner was involved with narcotics or in any type of organized crime. (R. 1.) The petitioner pled not guilty to the charges in the indictment. (R. 6.) A thirteen count superseding indictment was subsequently filed, which essentially just eliminated one of the previously charged money laundering counts. (R. 19.) Consequently, the district

court had subject matter jurisdiction in this case by virtue of 18 *U.S.C.* § 3231, which provides that"[t]he district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States."

Following a trial that occurred over the course of four days, a jury found the petitioner guilty of eleven of the thirteen counts charged in the superseding indictment. (R. 42.) The two counts of the superseding indictment for which the petitioner was found not guilty were counts five and eight, both involving charges of wire fraud. (R. 42.) Finding the petitioner to have a total offense category of 28 and a criminal history category of IV without any particular aggravating or mitigating factors, the honorable Judge R. Allan Edgar of the U.S. District Court for the Eastern District of Tennessee then sentenced the petitioner to concurrent terms of imprisonment for 124 months on the money laundering counts and 60 months on the wire fraud counts. (R. 42.) The petitioner was also ordered to pay restitution to his former employer (Long-Pontiac Mercedes Benz), whom he was found to have defrauded, in the amount of $713,998.00. (R. 42.) After filing a motion for a new trial (R. 28) and supporting brief (R. 45), which the district court denied (R. 47), the petitioner then timely filed his notice of appeal (R. 37). The U.S. Court of Appeals for the Sixth Circuit (consolidated case Nos. 96-5659 and 96-6589) ultimately affirmed the petitioner's conviction in all respects.

For the sake of brevity, the specific facts relative to each issue are set forth within the respective issue itself with citations to the transcript record. Nevertheless, the following provides a general background of the proof presented at trial.

The essence of the wire fraud scheme was that the

petitioner misused his position as general manager and sales manager of Long-Pontiac Mercedes Benz in Chattanooga, Tennessee, to sell high value used car trade-ins (such as Mercedes and BMW) and converted the proceeds from such sales to his own personal use. In some instances the petitioner would supposedly sell a trade-in to a wholesaler and have the wholesaler make a check payable to the trade-in owner. The petitioner would then supposedly forge the trade-in owner's name and then convert the check to his own use. To conceal his wrongdoings, the petitioner would also supposedly make false entries into the records of Long-Pontiac. The money laundering counts came into play because the petitioner supposedly placed the funds from these activities into various accounts at financial institutions. Testifying at trial in support of his defense, the petitioner maintained that the owner of Long-Pontiac Mercedes Benz, Mr. Nelson Long, knew what was going on and condoned it because of the cash-flow problems surrounding the car dealership.

For purposes of this petition, the respondent (United States of America) is referred to simply as the "government", while any references to the record are made by the symbol "R". Any references to the transcript of the proceedings are made by the symbol "TR", and, where appropriate, the abbreviation *U.S.S.G.* will be used to refer to the *United States Sentencing Guidelines.*

REASONS FOR GRANTING THE WRIT

I. THE PETITIONER WAD DENIED HIS SIXTH AMENDMENT RIGHT TO AN IMPARTIAL JURY BY THE DISTRICT COURT'S REFUSAL TO CONDUCT AN EVIDENTIARY HEARING

CONCERNING EVIDENCE THAT A JUROR WITHHELD PERTINENT INFORMATION FROM THE COURT DURING VOIR DIRE.

The decision rendered by the Sixth Circuit in this case contradicts the teaching and guidance of the U.S. Supreme Court, contradicts prior Sixth Circuit precedent, and contradicts Tennessee jurisprudential precedent. See, e.g., Smith v. Phillips, 455 U.S. 209, 102 S.Ct. 940 (1982); Zerka v. Green, 49 F.3d 1181 (6th Cir. 1995); and Ricketts v. Carter, 918 S.W.2d 419 (Tenn. 1996). According to the dictates of Smith v. Phillips, 455 U.S. at 215, 102 S.Ct. at 945 (1982), the U.S. Supreme Court "has long held that the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias." Yet, as shown below, the District Court, now affirmed by a panel of the Sixth Circuit, denied the petitioner his only opportunity to prove actual bias.

After being called to the jury box (R. 43, voir dire TR. p. 21, line 4), Mr. Dean Pesnell (juror #236) gave some brief background information about himself (R. 43, voir dire TR. p. 22, lines 9-15). Shortly thereafter, Mr. Humble asked the prospective jurors, "Have any of you all ever had any dealings with Long Pontiac?" (R. 43, voir dire TR. p. 24, lines 6-7) - a question to which Mr. Pesnell did not respond. After other jurors responses to that question, Mr. Humble posed the next question,

Q: [Mr. Humble] Have any of you ever sold cars? How about your husbands or wives, any or your spouses ever sold cars? Yes sir.

A: [Mr. Pesnell] My son sold.

Q: What kind of cars did he sell?

A: He sold just about every kind.

Q: Okay. How long ago was that?

A: Up until last year. He quit last year selling cars.

Q: Okay.

A: He sold at Capitol Toyota and Economy Honda and City Dodge.

Q: How long did he sell cars?

A: About 13 years.

Q: What's he doing now?

A: He's in the service station business.

(R. 43, voir dire TR. p. 25, line 16 - p. 26, line 6) (emphasis added).

Following a short discussion with two other prospective jurors on the same question, Mr. Humble concluded that line of questioning with a general question: "Okay. Anybody else? Is there anything about those people's experiences in selling cars that would make any difference to you all in this case?" (R. 43, voir dire TR. p. 26, lines 22-24). No prospective juror responded to this question, including Mr. Pesnell. Later, the petitioner's counsel, Jerry H. Summers, followed-up with a general question: "Do any of you know any reason why you feel that you could not or should not sit on this case?" (R. 43, voir dire TR. p. 33, lines 3-4). No response to Mr. Summers' question was made by any prospective juror, including Mr. Pesnell.

As can be seen by the transcript of the voir dire (with relevant excerpts noted above), Mr. Dean Pesnell (juror #236) was readily forthcoming with information that his son had been a car salesman at three Chattanooga area car dealerships (Capital Toyota, Economy Honda, and City Dodge). For unknown reasons, however, Mr. Pesnell withheld extremely material and prejudicial information from the district court that his son had also sold cars for Long Pontiac. Evidence gathered after the trial and brought to the district court's attention through a Motion for New Trial and accompanying documents included (1) the employment

records from Long Pontiac for Mr. Pesnell's son (Craig Pesnell), (2) an affidavit of the petitioner corroborating the fact that Mr. Pesnell's son worked as a car salesman at Long Pontiac while the petitioner was General Sales Manager for Long Pontiac, and attesting further to the fact that the relationship between the petitioner and Mr. Pesnell's son was not good because of pressure applied on the younger Pesnell as a result of his consistent lack of sales, and (3) other corroborating evidence. These facts, if proven true, would arguably present a valid basis for a challenge for cause, and which, if true, would show a high probability for actual bias on the part of the elder Mr. Pesnell (juror #236).

Under the Sixth Amendment to the U.S. Constitution, a criminally accused is entitled to a fair trial before an impartial trier of fact. Rhoden v. Morgan, 863 F.Supp. 612, 615 (M.D. Tenn. 1994) (citing Irvin v. Dowd, 366 U.S. 717, 721-722, 81 S.Ct. 1639, 1642 (1961); see, also, Morgan v. Illinois, 504 U.S. 719, 727, 112 S.Ct. 2222, 2229 (1992) (due process demands that jury stand impartial and indifferent to extent commanded by Sixth Amendment)). This right to an impartial jury is so fundamental to the American concept of ordered liberty that a defendant has the right to challenge a juror for cause on the grounds of a lack of impartiality even after the jury has rendered its verdict. See, e.g., Ricketts v. Carter, 918 S.W.2d 419, 423-424 (Tenn. 1996), and Green v. State, 247 S.W. 84 (Tenn. 1923). "[B]y exposing possible biases, both known and unknown, on the part of potential jurors", McDonough Power Equipment, Inc. v. Greenwood, 464 U.S. 548, 554, 104 S.Ct. 845, 849 (1984), the voir dire process is a key method of ensuring the criminally accused's right to a fair trial, Rhoden v. Morgan, 863 F.Supp. at 615 (M.D. Tenn. 1994). Obviously, however, the protections afforded the criminally accused by the voir dire process are

compromised if a juror is not forthcoming and truthful with facts about the individual juror.

This area of the law was addressed by the U.S. Supreme Court in McDonough Power Equipment, Inc. v. Greenwood, 464 U.S. 548, 555-556, 104 S.Ct. 845, 850 (1984), wherein it was held that a new trial is warranted only where a truthful answer would have provided a valid basis for a challenge for cause. Without mentioning McDonough specifically, U.S. v. Patrick, 965 F.2d 1390, 1399 (6th Cir. 1992) expounded upon this subject further saying:

> A prospective juror's failure to disclose material information is grounds for a new trial if it demonstrates bias. McCoy v. Goldston, 652 F.2d 654, 658-659 (6th Cir. 1981). If a juror is found to have deliberately concealed material information, bias may be inferred. If, however, information is not concealed deliberately, the movant must show actual bias. Cunningham v. Sears, Roebuck & Co., 854 F.2d 914, 916 (6th Cir. 1988)."

While a juror's motive for concealing information is relevant, even more probative is the nature of the undisclosed information. Zerka v. Green, 49 F.3d 1181, 1185 (6th Cir. 1995). This is so because "a well-intentioned juror omitting a material fact can do more damage than one who deliberately conceals an inconsequential fact". Id. (citing U.S. v. Scott, 854 F.2d 697 (5th Cir. 1988), where the court distinguished the difference between a juror's sincerity and a finding that the juror is not biased).

Considering the important constitutional ramifications, an evidentiary hearing was warranted on this issue, in accordance with the procedure approved in Zerka v. Green, 49 F.3d at 1186-1187 (6th Cir. 1995), to explore Mr. Pesnell's concealment of important information from the

court. It was reversible error for the district court to fail to hold such an evidentiary hearing. The main purpose for such an evidentiary hearing would have been to determine: (1) whether Mr. Pesnell's withholding of information that his son worked at Long Pontiac under the petitioner was intentional/deliberate (in which case bias may be inferred), and if not intentional/deliberate, (2) whether the petitioner could show actual bias, (3) whether the revelation of such information during voir dire would have provided sufficient grounds for a challenge for cause, and (4) whether this prejudicial information was communicated to other jurors. Although it is impossible for the petitioner to know whether any information about the petitioner which Mr. Pesnell had learned from his son was passed along to other jurors, Rule 606(b) of the *Federal Rules of Evidence* expressly provides for such an inquiry saying "... except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror". Consequently, an evidentiary hearing should have been conducted to determine whether this extraneous, prejudicial, outside information was improperly brought to bear upon any juror - including juror #236 (Mr. Pesnell). Under these circumstances, to allow the petitioner's conviction to stand, without even the benefit of an evidentiary hearing, would be to disregard the Sixth Amendment to the U.S. Constitution and its guarantee to the criminally accused the right to an impartial jury.

In essence, the Sixth Circuit's decision, if left intact, would effectively absolve the petitioner's constitutional right to be tried before an impartial jury. The key factor here is whether the district court abused its discretion by denying the petitioner's motion for either a new trial or an evidentiary

hearing because of juror misconduct.

The Sixth Circuit's opinion is plagued with incomplete information that has adversely influenced the ultimate decision and dictates this request for rehearing. Specifically, the Sixth Circuit relied upon the district court's conclusion that Juror #236 (Mr. Pesnell) would not have been excused for cause, even if Juror #236 had divulged the fact that his son worked directly under the defendant and for the victim of this offense (R. 47). The opinions of both the district court and this Sixth Circuit focused exclusively upon the fact that Mr. Pesnell's son merely worked at the same location as the petitioner. While this is true, a more intimate relationship existed between Mr. Pesnell's son and the petitioner than had actually been portrayed throughout these proceedings. First, Mr. Pesnell's son was supervised directly by the petitioner during his employment and the decision to terminate his employment was made by the petitioner. Obviously as well, Mr. Pesnell's son was also employed by the alleged "victim" of this offense - Nelson Long and Long Pontiac - elevating potential bias to a level that demands vigorous attention and further inquiry by way of an evidentiary hearing.

The Sixth Circuit has long maintained that "an evidentiary hearing on a juror's alleged failure to disclose information during voir dire must be granted when the defendant has alleged facts, which establish a prima facie case of impropriety and any doubt should be resolved in favor of granting the motion for evidentiary hearing." McCoy v. Goldston, 652 F.2d 654, 657 (6th Cir. 1981); Standard Alliance Industries, Inc. v. The Black Causon Company, 587 F.2d 813, 828 (6th Cir. 1978). Applying the principle enunciated in McCoy v. Goldston, supra, to the case at hand, establishes that an "abuse of discretion" has occurred. Yet the Sixth Circuit ignored its own teachings and those of the

U.S. Supreme Court when it rendered its opinion in the case at hand.

The following excerpts from the voir dire process further reveals the district court's abuse of discretion:

> MS. KAIN: I know the Longs.
> THE COURT: Their daughters?
> MS. KAIN: Yes. I know the wife personally.
> (R.43, voir dire TR. p. 5-6).
> **********
> MS. LASATER: I work at AmSouth bank.
> (R.43, voir dire TR. p. 7-8).
> **********
> MR. LEVI: I believe some seven or eight years ago our daughters (IRS Special Agent, Mr. Lynn Barker and Mr. Levi's daughters) were on the softball team. We knew each other just from softball that one season.
> (R.43, voir dire TR. p.9).

Not coincidentally, these potential jurors were excused on the basis of the information provided above even though they gave their assurances to the trial court that there was nothing that would affect their ability to be impartial. Despite these prior determinations, the district court asserted (and the Sixth Court upheld) that "[e]ven had the juror been asked whether his son had worked for Long Pontiac and responded affirmatively, this Court would not have excused this juror for cause." (R. 47, p. 11).

The petitioner respectfully submits that the prior decisions of the district court in regard to individuals affiliated with the "victim", the victim's wife, and the prosecution, as noted above, dispels any inclination that the district court would not have excused Juror #236 (Mr. Pesnell) for cause upon a complete list of his son's supervisor (who terminated

his son's employment) and was also directly employed by the alleged victim, Nelson Long). It is seemingly contradictory for the district court to maintain that, had this hidden information been revealed, Juror #236 would not have been excused for cause (and/or the defense or prosecution would not have exercised a peremptory strike). The Affidavit of defense counsel that accompanied the petitioner's Motion for New Trial substantiates as much. (R. 45, Exhibit E). Hence, the district court abused its discretion when determining that Juror #236 would not have been excused for cause (or peremptorily).

The leading case involving juror misconduct is McDonough Power Equip., Inc. v. Greenwood, 464 U.S. 548, 556 (1984), wherein the Supreme Court announced a two prong test to "obtain a new trial in such situations, as party must first demonstrate that a juror failed to answer honestly a material question on voir dire, and then further show that a correct response would have provided a valid basis for a challenge for cause." Id. Here, a situation that exceeds this prerequisite is presently before the Court - the district court's determination to the contrary notwithstanding.

As demonstrated above, the district court excused a number of potential jurors less involved with acquaintances of the parties than Juror #236 (Mr. Pesnell). The district court's judgment in this regard ostensibly was guided by the underlying purpose of voir dire and jury selection, namely to ensure the parties the benefit of an impartial trier of fact. McDonough, 464 U.S. at 550. The inevitable conclusion that the district court would have excused Juror #236 (Mr. Pesnell), had he revealed highly pertinent information, is reached when the voir dire proceeding as a whole is considered.

The first prong of the McDonough test is also satisfied

upon a proper interpretation of the voir dire process. The Sixth Circuit has long recognized that "it would be an aberration in the administration of justice if a juror could simply remain silent during voir dire and fail to disclose potentially disqualifying information." McCoy v. Goldston, 652 F.2d 654-658 (6th Cir. 1981). The relevant event at issue is hereby reiterated for the sake of clarity:

> MR. HUMBLE: How about your husbands or wives, any of your spouses ever sold cars? Yes sir.
>
> **********
>
> MR. PESNELL: My son sold.
>
> **********
>
> MR. PESNELL: He sold at Capital Toyota and Economy Honda and City Dodge.
>
> (R. 43, voir dire TR. pp. 25-26).

The Sixth Circuit's decision, faulting the petitioner for assuming Juror #236 (Mr. Pesnell) list of his son's former employers was complete, creates a grave injustice on the petitioner. A reasonable deduction that was concluded (apparently by no-less than all present in the courtroom) was that Juror #236 (Mr. Pesnell's) list of his son's former employers/supervisors was complete - that no further inquiry was necessary. At the very least, Juror #236's (Mr. Pesnell) deceptive information raises a substantial question as to whether or not his incomplete list was founded upon an improper or intentional omission. Mr. Pesnell simply "remained silent" and "failed to disclose [ ] disqualifying information." McCoy, supra. This is the identical scenario that this Court in McCoy sought to avoid, and therefore, the district court abused its discretion by failing to conduct an evidentiary hearing into Mr. Pesnell's motive - a fact intensive inquiry. Public confidence in our criminal jurisprudence will certainly diminish upon knowledge that the courts will tolerate a

disgruntled, ex-employee's father sitting as a tier of fact at the criminal trial of his son's former supervisor. At the very least an evidentiary hearing is necessary to develop a proper record in this matter and explore Mr. Pesnell's motive(s), thereby insuring compliance with constitutional requirements.

As reflected above, the Sixth Circuit's decision in the case at hand contains factual inaccuracies, but more importantly it strays from the path of prior, established precedent guaranteeing a criminally accused the right to a fair trial by an impartial jury. Furthermore, the district court erred in failing to see the potential bias of a juror who, for whatever reason, withheld important information from the court during the voir dire process. At a minimum, the district court should have held an evidentiary hearing upon the discovery of the potential bias as requested by the petitioner. Based on Zerka v. Green, 49 F.3d 1181, 1185 (6th Cir. 1995) and other relevant cases, the petitioner's Sixth Amendment fundamental right to an impartial jury was violated in the district court, such that the petitioner's conviction should be reversed and a new trial ordered.

II. THE GOVERNMENT VIOLATED BATSON V. KENTUCKY AND PURKETT V. ELEM BY USING TWO OF ITS SEVEN PEREMPTORY CHALLENGES TO EXCLUDE THE ONLY TWO BLACK PROSPECTIVE JURORS FOR NO REASON OTHER THAN NON-VERIFIABLE "BODY LANGUAGE".

Through a series of cases, the U.S. Supreme Court has established a three-prong test to determine whether a prosecutor's use of peremptory challenges to exclude individuals of a certain race from sitting on a jury violates the Equal Protection Clause of the Fourteenth Amendment. See, generally, Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986); Powers v. Ohio, 499 U.S. 400, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991); Edmonson v. Leesville

Concrete Company, Inc., 500 U.S. 614, 111 S.Ct. 2077, 114 L.Ed.2d 660 (1991); Purkett v. Elem, __ U.S. __, 115 S.Ct. 1769, 131 L.Ed.2d 834 (1995). The first prong of the test requires a defendant to establish a prima facie case of purposeful discrimination. Batson v. Kentucky, 476 U.S. at 96, 106 S.Ct. at 1723 (1986); Purkett v. Elem, __ U.S. at __, 115 S.Ct. at 1770 (1995). Recently, the Tennessee Supreme Court summarized the considerations used by the U.S. Supreme Court throughout these series of cases to determine whether the defendant has in fact established a prima facie case. See, Woodson v. Porter Brown Limestone Company, Inc., 916 S.W.2d 896 (Tenn. 1996). Specifically, "[a]ll relevant circumstances should be considered, including any pattern of strikes, questions and statements during voir dire, and the recognized inference that peremptory challenges create an atmosphere which allows discrimination". Woodson v. Porter Brown Limestone Company, Inc., 916 S.W.2d at 904 (citing Batson v. Kentucky, 476 U.S. at 96-98, 106 S.Ct. at 1722-24); U.S. v. Sangineto-Miranda, 859 F.2d 1501, 1519-1520 (6th Cir. 1988). While some courts consider the exclusion of the only minority members of the venire as sufficient to establish a prima facie case, see, Woodson v. Porter Brown Limestone Company, Inc., 916 S.W.2d at 901 (citing State v. Ellison, 841 S.W.2d 824, 827 (Tenn. 1992); Faison v. Hudson, 417 S.E.2d 305, 308 (Va. 1992); and In re of A.D.E., 880 S.W.2d 241, 243 (Tex. Ct. App. 1994)), the Sixth Circuit Court of Appeals in U.S. v. Sangineto-Miranda, 859 F.2d 1501, 1521 rejected such a "per se" rule because it does not take into account all relevant considerations.

As to the petitioner's burden under the first prong of the test, three key factors support the petitioner's prima facie case - evidencing purposeful discrimination by the government. First, there were thirty-two prospective jurors

empaneled to undergo questioning during voir dire, of which two were black (or in other words 6.25% of the venire was black). Ostensibly because the government did not like the "body language" of the two black jurors on the venire, the government used two of its seven peremptory challenges to dismiss both of the black prospective jurors. This exclusion of the only two blacks from the venire meant that the final jury which actually sat to decide the petitioner's case contained absolutely no black members (or in other words the actual jury which decided the defendant's case was 0% black). This difference between the percentage of minority members in the venire versus the percentage of minority members in the final jury actually sworn is at least a "factor pointing toward an inference of discrimination". See, U.S. v. Sangineto-Miranda, 859 F.2d at 1521-1522. Second, while the Sixth Circuit has held that the exclusion of the only minority members of the venire is not sufficient by itself to establish a prima facie case, U.S. v. Sangineto-Miranda, 859 F.2d at 1521, at a minimum this would obviously be a relevant factor lending further support to an inference of discrimination. Third, the government used 29% of its peremptory challenges (or two out of seven) against blacks even though only 6.25% of the venire was black. The combination of these three factors weigh heavily towards the petitioner's burden of establishing his prima facie case (although the ultimate determination as to whether the petitioner has established a prima facie case is up to the trial court, U.S. v. Sangineto-Miranda, 859 F.2d at 1520). At one point, the district court acknowledged its belief that the petitioner had made out a prima facie case (see R. 43, voir dire TR. p. 41, line 25 - p. 42, line 7).

In the last two sentences of the first paragraph on page three of the "United States' Response in Opposition to

Defendant's Motion For New Trial" (R. 31), the government, by implication, referred to the fact that since the petitioner was of a different race than the two excluded jurors, the petitioner's arguments on this issue have lesser value. However, the U.S. Supreme Court in Powers v. Ohio, 499 U.S. 400, 416, 111 S.Ct. 1364, 1373, 113 L.Ed.2d 411, __ (1991) specifically allowed a white defendant to have third party standing to challenge the exclusion of a black juror, stating that "race is irrelevant to the defendant's standing to object to the discriminatory use of peremptory challenges". Consequently this implication by the government is meaningless in determining whether the petitioner has made a prima facie case and only serves to needlessly cloud the real issues.

Assuming the petitioner is successful in making out a prima facie case, the burden shifts to the government to show a race-neutral explanation for the peremptory challenges. Purkett v. Elem, __ U.S. at __, 115 S.Ct. at 1770. In this regard, the only explanation given by the government was that the two black prospective jurors were struck because of suggestions supposedly made by the two jurors' "body language". According to the district court, the government met this burden (see R. 43, voir dire TR. p. 42, lines 10-12). In Purkett v. Elem, __ U.S. at __, 115 S.Ct. at 1771, the U.S. Supreme Court held that a prosecutor's proffered explanation that two black jurors were struck because of their long hair and/or facial hair was race-neutral and thus satisfied the second prong requiring the prosecution to articulate a non-discriminatory reason for the strike. The U.S. Supreme Court in Purkett v. Elem then went on to note that the growing of long, unkempt hair and the wearing of beards is not peculiar to any race. Id.

Once "a race neutral explanation is tendered, the trial

court must then decide (step 3) whether the opponent of the strike has proved purposeful racial discrimination". Purkett v. Elem, __ U.S. at __, 115 S.Ct. at 1770-1771. The district court's ruling on this issue went as follows:

> [The Court] ... But I find it difficult to confirm your observation based upon what I've seen here in the courtroom, but then again, I don't claim to have seen everything either. I'm obviously not looking for the same things that you're looking for in picking a jury.
>
> I'll just have to say that I don't think it has been shown here that I can find by, that the defendant has carried his burden of showing that there is purposeful discrimination. I think one thing, too, here is, of course, the defendant is white, as well. The defendant is white.

(R. 43, voir dire TR. p. 44, line 19 - p. 45, line 3).

As recognized by the district court, no confirmation of the government's purported justification for excluding the two black jurors could be made. Given this fact, the petitioner respectfully contends that the government's use of non-verifiable criteria to dismiss the only two black members of the jury pool is distinguishable from the physical characteristics observed, verified, and approved as race-neutral in Purkett v. Elem. Also, as shown above in Powers v. Ohio, the fact that the petitioner was white and the two excluded jurors were black was irrelevant. To the extent that this factor actually played a role in the court's decision, then this too is erroneous and further justifies reversal.

Considering the government's dismissal of the only two black members of the venire for no reason other than supposedly because of unverified "body language", especially in light of the important rights implicated under the Equal

Protection Clause of the U.S. Constitution, the balance arguably falls in favor of the petitioner such that the petitioner's conviction should be set aside and a new trial ordered. See, generally, People v. Jamison, case # B082926 (Cal. Ct. App., 2nd Dist., decided March 12, 1996) (attached as Exhibit F to the petitioner's Brief in Support of Motion for New Trial - R. 45) (reversing conviction since California's Constitution prohibits a prosecutor from excluding a juror solely because the juror purportedly avoided eye contact - "In the absence of body language that is more expressive and commonly recognized as a sign of hostility, other factors must be present to constitute a race-neutral explanation." - to rule otherwise would give prosecutors "carte blanche" to discriminate.); see, also, U.S. v. Hinton, No. 95-3678 (7th Cir. 9/3/96) (wherein the court held that a prosecutor's observations that a prospective juror was wearing a "Malcolm X" cap and sat with his arms crossed during a portion of the voir dire constituted an adequate race-neutral explanation for exercising a peremptory challenge against the juror).

Thus, while Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), and its progeny including the recent case of Purkett v. Elem, __ U.S. __, 115 S.Ct. 1769, 131 L.Ed.2d 834 (1995), permit the government wide latitude in dismissing prospective jurors, there must be some verifiable limitation on the exercise of this great power. The government's use of non-verifiable criteria (i.e. "body language") to dismiss the only two black members of the jury pool is readily distinguishable from the physical characteristics observed, verified, and approved as race-neutral in Purkett v. Elem. Where, as here, the only minority members of the venire pool were dismissed for reasons that the district court admittedly could not verify, then such

dismissals constitute reversible error.

III. THE DISTRICT COURT REVERSIBLY ERRED BY ALLOWING THE GOVERNMENT'S CROSS-EXAMINATION OF THE PETITIONER TO IMPROPERLY DELVE INTO THE DETAILS BEHIND THE PETITIONER'S PRIOR CONVICTIONS, ESPECIALLY WHEN COMBINED WITH THE DISTRICT COURT'S FAILURE TO GIVE AN IMMEDIATE, CAUTIONARY JURY INSTRUCTION.

Just last term, the U.S. Supreme Court in U.S. v. Old Chief, ___ U.S. ___, 117 S.Ct. 644, 136 L.Ed.2d 574 (1997), reversed a conviction based on Rule 403 of the *Federal Rules of Evidence*, holding that the district court abused its discretion by rejecting the defendant's offer to concede the fact of a prior conviction, and instead admits the full record of a prior judgment, when the name or nature of the prior offense raises the risk of a verdict tainted by improper considerations, and when the purpose of the evidence is solely to prove the element of prior convictions. This case presents the court with a similar opportunity to clarify the discretion of a district court under Rule 609(a) of the *Federal Rules of Evidence*.

Like the fourth assignment of error in U.S. v. Turner, 995 F.2d 1357, 1363 (6th Cir. 1993), the petitioner respectfully contends that the district court erred, not because impeachment evidence was introduced that the petitioner had some prior felony convictions (for the petitioner revealed that himself during voir dire, see R. 43, voir dire TR. pp. 33-34, and on direct examination, see R. 56, TR. pp. 327-329), but rather because the government was permitted too broad of an inquiry on cross-examination into the details of the petitioner's prior convictions. In this regard, the relevant portion of the trial transcript to which the petitioner is referring (the government's cross-examination of the petitioner about his prior convictions, on

the third day of trial) starts on page 392 and goes through page 417 (R. 49).

Rule 609(a) of the *Federal Rules of Evidence* in relevant part provides:

> "(1) ..., and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and (2) evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment."

Notably, Rule 609(a) only refers to evidence of convictions, and does not contain any references to the admissibility of details surrounding the convictions which are used to impeach the accused. One ostensible reason the rule makes such a distinction is the inherent danger that a jury would consider such detailed convictions as evidence that the accused is more likely to have committed the crime alleged instead of as impeaching evidence on credibility. See, e.g., U.S. v. Amahia, 825 F.2d 177, 180 (8th Cir. 1987); U.S. v. Roenigk, 810 F.2d 809, 815 (8th Cir. 1987); and U.S. v. Cox, 536 F.2d 65, 71 (5th Cir. 1976). Such danger is especially viable when the prior convictions involve crimes similar to crime(s) for which the accused is on trial. See, Gordon v. U.S., 383 F.2d 936 (D.C. Cir. 1967).

Thus, the general rule is that if a criminally accused is impeached by use of a prior conviction under Rule 609 of the *Federal Rules of Evidence*, the only matters as to the prior conviction which should be elicited are (1) the date of conviction, (2) the fact of conviction, and (3) the nature of the crime. U.S. v. Amahia, 825 F.2d at 180 (8th Cir. 1987). Usually, inquiry into the details of the prior crime for which the

accused was convicted is not permissible. See, e.g., Tennessee Law of Evidence, Cohen, Sheppeard, and Paine, 3d Ed., § 609.11, pp. 381-382 (citing Long v. State, 607 S.W.2d 482, 485 (Tenn. Crim. App. 1980)) - both dealing with the comparable Rule 609(a)(3) of the *Tennessee Rules of Evidence* - and compare with U.S. v. Amahia, 825 F.2d at 180 (8th Cir. 1987) (if accused on direct examination explains away or excuses guilt of prior conviction, on cross-examination court can allow questions about details of prior offense) and U.S. v. Wolf, 561 F.2d 1376 (10th Cir. 1977) (since accused on direct examination gave favorable impression of prior convictions, government entitled to cross-examine on relevant facts).

In addressing this similar issue, the Sixth Circuit in U.S. v. Turner, 995 F.2d 1357 (6th Cir. 1993), observed that "[o]ther courts that have addressed this issue have concluded that examination of the circumstances of prior felony convictions should be limited". U.S. v. Turner, 995 F.2d at 1363 (citing U.S. v. Roenigk, 810 F.2d 809 (8th Cir 1987), and U.S. v. Cox, 536 F.2d 65 (5th Cir. 1976)). Ruling against the defendant though, the Turner court distinguished Roenigk and Cox by noting that the only elicited details which were challenged by the Turner defendant were the admission of the venue of his prior convictions (which the court called irrelevant but not highly prejudicial), and the fact that his most recent conviction was for escaping from a work release program (which the court said the jury would have found out about anyway).

Another case involving a challenge to the prosecution's inquiry into the details of prior convictions is U.S. v. Hurst, 951 F.2d 1490 (6th Cir. 1991). While the court in Hurst upheld the trial court's actions allowing the questioning under Rule 608(b) of the *Federal Rules of Evidence*, two key

distinguishing factors were noted in the Hurst case as important to the holding which are not present in the petitioner's case. First, "the scope of cross-examination was narrow and brief" - that is, "the government did not badger the witness, nor did it exhaustively comb the subject". U.S. v. Hurst, 951 F.2d at 1501. Secondly, immediately after the government's questioning of the defendant about his prior convictions, the district court issued an extended precautionary instruction to the jury.

Both Turner and Hurst thus stand in stark contrast with the amount and depth of details revealed about the petitioner's prior convictions in the case at hand. Just one example of the overly broad and improper questioning engaged in by the government occurred over the government's exhibit 42 (see R. 49, TR. pp. 399-404). After setting forth the specific, lengthy allegations in count one of exhibit 42, the following exchange occurred between the government and the petitioner/witness (R. 49, TR. p. 400, starting on line 5):

Q: [by the prosecutor, Mr. Humble] ... That was what you were charged with in Count 1?

A: [by the petitioner, Allan Ledford] That's correct.

Q: You pled guilty to that?

A: Yes, sir.

Even though the petitioner had just admitted his guilt to the offense charged, the government's questioning pressed onward (R. 49, TR. p. 400, starting on line 10):

Q: Were you guilty of that offense?

A: I was guilty of taking the card down there and opening the account, yes, sir.

Q: Sir, were you guilty of forging someone's name with intent to defraud?

A: I didn't forge his name on that bank card, sir.

Q: My question was, were you guilty?

A: Yes, sir.

Despite the petitioner's having admitted his guilt for the second time, the government's questioning still continued (R. 49, TR. p. 400, starting on line 18):

Q: You were, in fact, guilty of that?

A: I was charged with it, and an agreement was reached, yes, sir.

Q: And did you have the intent to defraud when you forged that signature?

A: No, sir.

Q: You deny that?

A: Yes, sir.

Whereupon the subsequent dialogue evolved around the petitioner's attempted explanation of the reasons for his having pled guilty. Consequently, this case presents a different situation from that involved in U.S. v. Amahia, supra, and U.S. v. Wolf, supra, because here the petitioner admitted to the offense(s) charged, but only resorted to explanations upon further questioning by the government.

To make matters worse, the district court did not attempt to correct the severe prejudicial impact of such detailed, laborious questioning by giving the jury any kind of precautionary instruction to place such questioning into its proper context. Unlike the defendant in Hurst, the petitioner in the case at hand had to wait until the end of the trial for the jury hearing his case to receive a far more limited jury instruction on "Impeachment of Defendant by Prior Conviction" (see R. 50, jury charge p. 19). At this point in the trial, the damage to the petitioner had already been done and was arguably irreversible.

For brevity purposes, the petitioner respectfully refers the court to two other fairly recent cases from the Sixth

Circuit which, although not directly on point, nevertheless provide persuasive authority for the petitioner's position on this issue. See, generally, U.S. v. Moore, 917 F.2d 215 (6th Cir. 1990) (holding that the potential prejudicial impact of admitting a similar prior felony into evidence for impeachment purposes was overcome by the trial court's *immediate* admonishment to the jury to consider the evidence only as to witness credibility); and U.S. v. Morrow, 977 F.2d 222 (6th Cir. 1992) (en banc) (where, in rejecting the defendant's challenge to the fact that two prior felony convictions were used to impeach him, the court noted that the trial court expressly limited the cross-examination to eliciting whether or not the defendant admitted the convictions, and commented that "[s]uch caution by the court reflects a concern for the potentially prejudicial effect of this evidence").

To summarize, the district court improperly permitted the government too broad of an inquiry on cross-examination into the details of the petitioner's prior convictions. To make matters worse, unlike numerous other cases, the district court failed to make an immediate, cautionary instruction to the jury, preferring instead to wait until the end of the trial to make a very limited instruction along with all the other jury instructions. These mistakes unduly prejudiced the petitioner to the point where his conviction should be reversed.

IV. THE APPLICATION OF 18 *U.S.C.* § 1956(a)(1)(B)(i) TO PUNISH CRIMINAL BEHAVIOR NOT INVOLVING DRUGS OR ORGANIZED CRIME CONTRAVENES THE CONGRESSIONAL INTENT BEHIND THE MONEY LAUNDERING STATUTE.

In an effort to combat international drug trafficking and traditional organized crime, Congress passed the Money Laundering Control Act of 1986 (codified at 18 *U.S.C.* §§ 1956-1957). See, 132 Cong. Rec. 18,486-18,487 (1986) (statements of Senators Thurmond and Hatch); President's

Commission on Organized Crime, "The Cash Connection: Organized Crime, Financial Institutions, and Money Laundering" 4-8 (1984); U.S. v. Daccarett, 6 F.3d 37, 43 (3rd Cir. 1993); see, also, American Criminal Law Review, "The Money Laundering Control Act of 1986: Creating A New Federal offense Or Merely Affording Federal Prosecutors An Alternative Means Of Punishing Specified Unlawful Activity?", by Jimmy Gurule´, Vol. 32, p. 823-854 (providing further details and insight into the legislative history of 18 *U.S.C.* § 1956). While mail fraud is listed as a "specified unlawful activity" under 18 *U.S.C.* 1961(1), which in turn is made applicable to 18 *U.S.C.* § 1956 through the language of 18 *U.S.C.* § 1956(c)(7), implicit within the definition of "specified unlawful activity" under 18 *U.S.C.* § 1956(c)(7) is the understanding that the offenses referred to in 18 *U.S.C.* 1961(1) must be related to drugs or organized crime in order to be applicable in 18 *U.S.C.* § 1956. Through creative thinking and application by the U.S. Attorney's office, 18 *U.S.C.* § 1956 has been expanded and applied to punish criminal behavior that are not related to drugs or organized crime, even though Congress did not intend such behavior to be covered by the money laundering statute. The majority of cases reflect the money laundering statute's intended application to drugs and organized crime, although their results are often conflicting. See, e.g., U.S. v. Hamilton, 931 F.2d 1046 (5th Cir. 1991); U.S. v. Samour, 9 F.3d 531 (6th Cir. 1993); U.S. v. Skinner, 946 F.2d 176 (2nd Cir. 1991); and U.S. v. Dimeck, 24 F.3d 1239 (10th Cir. 1994). However, in a few cases, like the petitioner's case, the government has sought to extend 18 *U.S.C.* § 1956 to cover behavior not involving drugs or organized crime.

Since the money laundering allegations against the petitioner did not involve activities related to drugs or

organized crime, allowing the petitioner's conviction under 18 *U.S.C.* § 1956 to stand would effectively contravene the Congressional intent behind this statute. By reversing the petitioner's conviction as contrary to Congressional intent, this honorable court would force the government to limit prosecution under 18 *U.S.C.* § 1956 to its proper and intended context.

U.S. v. Haun, 90 F.3d 1096 (6th Cir. 1996), as applied to the case at hand, and similar cases should be overruled because the true Congressional intent behind the federal money laundering statute shows that the statute was not meant to apply to offenses not involving narcotics or organized crime. This argument is similar to the argument that was raised and rejected in U.S. v. Haun, 90 F.3d 1096 (6th Cir. 1996). However, the decision in U.S. v. Haun is in conflict with U.S. v. Caba, 911 F.Supp. 630 (E.D.N.Y. 1996) (opinion by Judge Trager). U.S. v. Caba discusses the legislative intent behind surrounding this issue, and the petitioner respectfully suggests it represents a more enlightened judicial interpretation of the money laundering statute.

V. 18 *U.S.C.* § 1956(a)(1)(B)(i) IS UNCONSTITUTIONALLY VAGUE BY NEGLECTING TO DEFINE WHAT IS MEANT BY THE WORD "PROCEEDS".

One reason the government was able to creatively prosecute the petitioner for money laundering, even though no drugs or organized crime were involved in the alleged activities, is because 18 *U.S.C.* § 1956(a)(1)(B)(i) neglects to define the word "proceeds". This lack of a definition for the word "proceeds" effectively allows for such creative thinking on the part of the government and thereby encourages the arbitrary and discriminatory enforcement of 18 *U.S.C.* § 1956. This shortcoming in the statute runs afoul of the

requirement that penal statutes contain sufficient definiteness, see generally Kolender v. Lawson, 461 U.S. 352, 357, 103 S.Ct. 1855, 1858, 75 L.Ed.3d 903 (1983) (citations omitted), and consequently renders the statute unconstitutionally void for vagueness under the Fifth and Fourteenth Amendments to the U.S. Constitution. Cf. U.S. v. Werber, 787 F.Supp. 353, 358 (S.D.N.Y. 1992).

Neither this issue nor Issue IV cited above have been resolved by the U.S. Supreme Court despite numerous cases from lower federal courts construing the meaning and Congressional intent behind 18 *U.S.C.* § 1956. See, e.g., U.S. v. Edgmon, 952 F.2d 1206 (10th Cir. 1991); U.S. v. Heaps, 39 F.3d 479 (4th Cir. 1994); and U.S. v. Jackson, 935 F.2d 832 (7th Cir. 1991). Defining the permissible scope of coverage of 18 *U.S.C.* § 1956 would settle an important, confusing, and as-yet unsettled question of federal law.

VI. THE MONEY LAUNDERING SENTENCING GUIDELINE (*U.S.S.G* § 2S1.1) IS NOT APPLICABLE TO OFFENSES THAT ARE NEITHER DRUG RELATED NOR ORGANIZED CRIME-RELATED, AND EVEN IF SO THE SEVERITY OF THE GUIDELINE IN SUCH SITUATIONS NECESSITATES THE APPLICATION OF A DOWNWARD DEPARTURE.

Should the court desire to uphold U.S. v. Haun, 90 F.3d 1096 (6th Cir. 1996) and related cases, there is ample authority to suggest that the severity of the money laundering sentencing guideline, *U.S.S.G.* § 2S1.1, reflects that either it should not apply to money laundering offenses not involving narcotics or organized crime, or else its application in such cases should be coupled with a downward departure pursuant to *U.S.S.G.* § 5K2.0. Although the literal wording of the federal money laundering statute might cover criminal offenses not involving narcotics or organized crime, the severity of the money laundering sentencing guideline (*U.S.S.G*

§ 2S1.1) reflects that it was designed to deter drug-related and organized crime-related offenses, such that either it is inappropriate to apply the money laundering sentencing guideline to non-drug-related or organized crime-related offenses, or else it justifies a downward departure from the money laundering sentencing guideline when narcotics or organized crime are not involved.

The money laundering sentencing guideline (U.S.S.G § 2S1.1) simply was not designed to apply to offenses that were not drug-related or organized crime-related, such that the district court erred in sentencing the petitioner pursuant to this section of the U.S. Sentencing Guidelines. Because the petitioner's conduct fell outside the "heartland" of the money laundering sentencing guideline, the petitioner should have been sentenced pursuant to the wire fraud sentencing guideline, *U.S.S.G.* § 2F1.1, instead. See, U.S. v. Caba, 911 F.Supp. 630 (E.D.N.Y. 1996); see, also, U.S. v. Skinner, 946 F.2d 176 (2nd Cir. 1991); but see, U.S. v. LeBlanc, 24 F.3d 340 (1st Cir. 1994). The Sixth Circuit's opinion in U.S. v. Haun, 90 F.3d 1096 (6th Cir. 1996), is distinguishable in that its holding is related to the money laundering statute, whereas the case at hand deals with whether the money laundering provision of the sentencing guidelines actually applies to non-drug and non-organized crime related offenses.

Furthermore, at the very least, the fact that the money laundering offenses, which the petitioner was found to have committed, did not involve narcotics or organized crime is a mitigating factor that should have resulted in a downward departure from the normal "heartland" of money laundering cases which do involve narcotics and/or organized crime. Again, because the money laundering offenses in this case did not involve narcotics or organized crime, this case

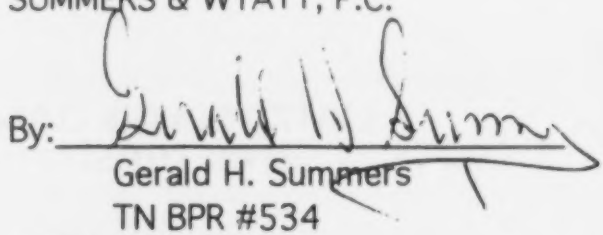
does not fall within the "heartland" of the typical money laundering cases embodying the conduct to which *U.S.S.G.* § 2S1.1 was directed. Therefore, the petitioner should have received a downward departure pursuant to *U.S.S.G.* § 5K2.0. See, 18 *U.S.C.* § 3553(b), and U.S. v. Caba, 911 F.Supp. 630 (E.D.N.Y. 1996); but see, U.S. v. LeBlanc, 24 F.3d 340 (1st Cir. 1994).

CONCLUSION

Based on the foregoing, this petition for a writ of certiorari should be granted. If the petition is granted, the petitioner respectfully submits that his conviction should be reversed and a new trial granted the petitioner. At a minimum, the petitioner respectfully contends that the case should be remanded for an evidentiary hearing on the possible misconduct/bias of one of the jurors. Together with the enlightened facts that such an evidentiary hearing would provide, the above issues, individually and certainly collectively, warrant the ultimate reversal of the petitioner's conviction and the granting of a new trial for the petitioner.

Respectfully submitted,

SUMMERS & WYATT, P.C.

By: 

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APPENDIX DESIGNATION

A. U.S. v. Ledford, unpublished opinion from the Sixth Circuit
B. Sixth Circuit Order denying petition to rehear

NOT RECOMMENDED FOR PUBLICATION

Nos. 96-5659/6589

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA	)	
	)	
Plaintiff-Appellee,	)	
	)	**ON APPEAL** FROM THE
	)	UNITED STATES DISTRICT
	)	COURT FOR THE EASTERN
v.	)	DISTRICT OF TENNESSEE
	)	
	)	**OPINION**
ALLAN LEDFORD,	)	
	)	
Defendant-Appellant.	)	

BEFORE: NORRIS and BATCHELDER, Circuit Judges; ALDRICH, District Judge.*

ALAN E. NORRIS, Circuit Judge. Defendant Allan Ledford appeals his multi-count conviction for wire fraud and money

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* The Honorable Ann Aldrich, United States District Judge for the Northern District of Ohio, sitting by designation.

laundering. For the reasons outlined below, we now affirm both his conviction and sentence.

I.

Defendant worked for a Chattanooga, Tennessee automobile dealership for several years, eventually serving as its sales manager. During his tenure as sales manager, he engaged in a pattern of fraudulent behavior that eventually led to his prosecution: he would purchase expensive used automobiles from prospective customers as part of a trade-in and then resell them to wholesalers. However, rather than turn the proceeds of these transactions over to the dealership, defendant converted the funds to his own use. A jury found him guilty on six counts of wire fraud, 18 U.S.C. § 1343, and on five counts of money laundering, 18 U.S.C. § 1956(a)(1)(B)(i).

II.

I. *Jury Selection*

Defendant raises two issues that relate to the composition of the jury that convicted him. First, he contends that the prosecution unconstitutionally used its peremptory strikes to exclude two black potential jurors. Second, he argues that the potential bias of one juror deprived him of a fair trial. We address each allegation in turn.

a. use of peremptory strikes

In *Batson v. Kentucky*, 476 U.S. 79, 89 (1986), the Supreme Court held that "the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race." Because jury service represents a "significant opportunity to participate in civic life," white defendants, such as Mr. Ledford, have standing to assert the equal protection rights of excluded black venire persons. *Powers v. Ohio*, 499 U.S. 400, 409 (1991).

The determination of whether the prosecution has improperly used its peremptory strikes to exclude black jurors involves three steps. First, the defendant must make a *prima facie* showing that the prosecutor has in fact exercised challenges based upon the race of the prospective juror. Once the requisite showing has been made, the burden of production shifts to the prosecution to articulate a race-neutral explanation for striking the jurors in question. Third, the trial court must decide whether the opponent of the strike has proved purposeful discrimination. *Hernandez v. New York*, 500 U.S. 352, 358-59 (1991).

During jury selection, the government chose to use two of its peremptory challenges to strike the only blacks from the thirty-two person venire. The district court concluded that this "statistic alone warranted a finding that the defendant had made out a *prima facie* case." The prosecution then offered the following race-neutral reason for its decision:

> I thought both of them were too responsive, especially Ms. Browdy, to [defense counsel]. She had a lot of eye contact and nodding her head up and down and seemed like she'd be really, I was getting a lot of body language that she'd be sympathetic to [defendant], less so from Mr. Adair, but I was getting the contrary from him, kind of cold to me, so that's why I struck them. That's just – it's just [a] judgment call based upon the signs that I was getting understanding that this is not like I have a chance to sit down with these people and get to know them personally. I have to read body language and their response and make these judgment calls.

The district court noted that this explanation contained "no inherent discriminatory intent" and therefore concluded that defendant had failed to carry his burden of showing that the government engaged in purposeful discrimination in choosing a jury.

The explanation offered by the government highlights the difficulty in assessing *Batson* challenges when the justification for a decision to strike is based upon a trait as subjective as "body language." In discussing the proffered reason with counsel, the trial judge himself confessed that he found it "difficult to confirm your observation [

hostile body language] based upon what I've seen here in the courtroom" and went on to note that crediting subjective explanations for peremptory strikes could allow an improperly motivated prosecutor to circumvent *Batson*.

While a potential for abuse undoubtedly exists, it is minimized by the fact that the district court has the power to disbelieve even a race-neutral explanation proffered by the prosecution. *Hernandez*, 500 U.S. at 365 ("In the typical peremptory challenge inquiry, the decisive question will be whether counsel's race-neutral explanation for a peremptory challenge should be believed"). Although an implausible explanation may satisfy the government's evidentiary burden to rebut a *prima facie* case, such justifications should ultimately be rejected by the trial court as pretexts for purposeful discrimination at the third step of the

Furthermore, the ultimate question of discriminatory intent represents a finding of fact to which we accord great deference on appeal. *Hernandez*, 500 U.S. at 364. Because it often involves an assessment of the prosecutor's state of mind, the trial court is better able to make judgments of credibility than an appellate court because the trial court alone has the opportunity to observe the demeanor of counsel. *Id.* at 365. Accordingly, we will reverse only on a finding of clear error. Our review of the record convinces us that no such error exists.

b. juror bias

After his conviction, defendant filed a motion for a new trial based in part upon his discovery that one juror had failed to disclose information during voir dire that, if revealed, might have supported a challenge for cause. Specifically, the juror's son had worked briefly in [illegible] to an [illegible]strict

court denied the motion, a decision that we review for abuse of discretion. *United States v. Patrick*, 965 F.2d 1390, 1399 (6th Cir. 1992).

While a prospective juror's failure to disclose material information is grounds for a new trial if it demonstrates bias, *id.*, the party seeking a new trial must demonstrate that the prospective juror failed to answer a material question honestly and then further show that a correct response would have provided a valid basis for a challenge for cause. *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548, 556 (1984).

The district court found, and we agree, that defendant has not met either of the *McDonough* requirements. No one asked the juror during *voir dire* whether his son had worked with defendant or at the dealership where defendant served as sales manager; rather, he answered the questions posed honestly. It is not the responsibility of a

prospective juror to anticipate and then volunteer every piece of information that might conceivably be of use to counsel. Moreover, even if the information about his son's employment history had been disclosed, it would not have provided grounds for a challenge for cause. As the district court observed, the juror had consistently asserted that he could be impartial.

2. Application of Money Laundering Statute to Crimes Unrelated to Drugs

Defendant next asks us to reconsider an earlier panel decision, *United States v. Haun*, 90 F.3d 1096, 1099 (6th Cir. 1996), which held that the money laundering statute under which defendant was convicted, 18 U.S.C. § 1956(a)(1)(A), included non-drug related transactions. A panel of the court may not overrule the decision of a prior panel unless an inconsistent opinion of the Supreme Court requires it. *Golden v. Kelsey-Hayes Co.*, 73 F.3d 648, 654 (6th Cir.), *cert denied*, 117 S. Ct.

49 (1996). Defendant does not contend that *Haun* is inconsistent with any Supreme Court decision, and we therefore affirm the application of the money laundering statute to the conduct with which defendant was charged.

3. Extent of Cross-Examination

Defendant testified at his trial. As a means of impeaching defendant's credibility, the prosecutor on cross-examination delved into defendant's prior felony convictions for passing bad checks. Federal Rule of Evidence 609(a)(1) provides, "For the purpose of attacking the credibility of a witness, . . . evidence that an accused has been convicted of [] a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused." Furthermore, under Fed. R. Evid. 609(a)(2), convictions involving dishonesty or false statements are admissible as to all witnesses.

Defendant does not contend that the prosecution's introduction of his prior convictions constituted error. Rather, defendant objects to the detailed cross-examination about the specifics of the crimes. A review of the trial transcript reveals that the prosecutor produced copies of the earlier indictments, read them to defendant, and asked him to verify his guilt on the charges. The record also reveals that the defendant equivocated in his responses, at one point testifying that he had pleaded guilty in various state courts, not because he committed the crimes, but instead on the advice of counsel. Receiving less than satisfactory answers, the prosecutor asked a number of specific questions about each conviction.

Defense counsel initially objected to the "scope" of the cross-examination, maintaining that Rule of Evidence 609 only permits inquiry into the nature of the prior felony, not into its details. While this proposition is generally true, the district court found that, given

defendant's attempt to minimize his guilt, some latitude in cross-examination was appropriate. *See generally United States v. Robinson*, 8 F.3d 398, 410 (7th Cir. 1993).

Since briefs were filed in this case, the Supreme Court decided *Old Chief v. United States*, 117 S. Ct. 644 (1997), and defendant argues that it affects our analysis of this issue. While *Old Chief* certainly reminds us that courts must be sensitive to the potential for unfair prejudice when evidence of other criminal convictions is introduced, it does not control the outcome of the case before us. In *Old Chief*, the prior conviction was not used for impeachment purposes under Rule of Evidence 609, nor did the defendant attempt to minimize his guilt. Under the circumstances of this case, the district court acted within its discretion in permitting the prosecutor to explore the facts of the prior convictions sufficiently to allow the jury to evaluate defendant's credibility.

4. Order of Restitution

The final issue before us concerns restitution. As part of its judgment, the district court ordered defendant to pay restitution in the amount of $713,998.00 to his former employer pursuant to the Mandatory Victims Restitution Act of 1996 ("MVRA"), 18 U.S.C. § 2248 *et seq.* Defendant challenges this restitution order on two grounds: first, that application of the MVRA violates the Ex Post Facto Clause of the Constitution;[1] and second, that the calculation of the restitution amount impermissibly takes into account conduct for which defendant was not convicted.

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[1] Defendant also argues that the recent Supreme Court decision in *Lindh v. Murphy*, 117 S. Ct. 2059 (1997), supports the position that the MVRA does not apply retroactively. After careful consideration, we find *Lindh* to be inapposite.

A law runs afoul of the Ex Post Facto Clause if it is retrospectively applied and imposes "a greater punishment, than the law annexed to the crime, when committed." *Lynce v. Mathis,* 117 S. Ct. 896 (1997) (citing *Calder v. Bull*, 3 Dall. 386, 390 (1798)); *see also Miller v. Florida*, 482 U.S. 423, 430 (1987). A key question, then, is whether the amount of restitution for which defendant was responsible under the terms of the MVRA was greater than it would have been under the previous restitution statute, the Victim and Witness Protection Act of 1982, U.S.C. § 3663-64 ("VWPA"). If both statutes permit the amount of restitution ordered by the district court, no *ex post facto* problems exists because the defendant suffered no "greater punishment."

As the district court noted, when an offense causes a victim to lose property, the VWPA allows orders of restitution that include "the value of the property on the date of the damage, loss or destruction, or

the value of the property on the date of the sentencing, less the value (as of the date the property is returned) of any part of the property that is returned." 18 U.S.C. § 3663(b)(1)(B)(i)-(ii) (superseded). The plain language of the statute, therefore, allows an order of restitution for the full amount of loss. Because the district court's reliance upon the MVRA did not result in an increased order of restitution, the Ex Post Facto Clause was not violated.[2]

In calculating the amount of restitution owed by defendant, the district court relied in part upon the Presentence Investigation Report ("PSI"). The PSI calculated the monetary loss attributable to the counts of conviction to be $201,000; however, it went on to consider other criminal conduct that resulted in total losses of $713,998, which was the

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[2] The government also argues that the MVRA was not retroactively applied. We do not reach that issue.

amount of restitution that was ultimately ordered. Defendant contends that the restitution order is at odds with *Hughey v. United States*, 495 U.S. 411, 413 (1990), which held that restitution awards made under the VWPA are limited to losses caused by specific conduct that is the basis of the offense of conviction.

However, the VWPA was amended by the Crime Control Act of 1990, *see* Pub. L. No. 101-647, § 2509, 104 Stat. 4789, 4863 (1990), to expand the definition of "victim" to include "any person harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern." 18 U.S.C. § 3663(a)(2). As this court has noted, this amendment "would appear to authorize restitution for all losses attributable to [defendant's] scheme to defraud." *United States v. Jewett*, 978 F.2d 248 (6th Cir. 1992). Whether we consider defendant's repeated misappropriation of funds from his trade-ins to be a "scheme to defraud" or a "pattern," it is abundantly clear that under

the terms of the VWPA,[3] defendant can be ordered to pay restitution for all of his conduct.

Accordingly, we affirm the district court's order of restitution in the amount of $713,998.00.

III.

The judgment of the district court is hereby **affirmed**.

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[3] The MVRA contains essentially the same definition of victim: "[A] person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered including, in the case of an offense that involves as an element a scheme, conspiracy, or pattern of criminal activity, any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern." 18 U.S.C. § 3663A(a)(2).

Case No. 96-5659
96-6589

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

O R D E R

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

ALLAN LEDFORD

Defendant - Appellant

BEFORE: NORRIS and BATCHELDER, Circuit Judges; ALDRICH, District Judge.

Upon consideration of the petition for rehearing filed by the appellant,

It is **ORDERED** that the petition for rehearing be, and it hereby is, **DENIED.**

ENTERED BY ORDER OF THE COURT

/s/_____
Leonard Green, Clerk